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No. 06-39

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

IN THE MATTER OF THE ESTATE OF SAMUEL M. DAMON,
TRUST CREATED UNDER THE WILL OF SAMUEL M. DAMON,
CHRISTOPHER JAMES DAMON HAIG,
Petitioner,

v.

SHARON DAMON, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Hawaii

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether petitioner properly presented his federal claim to the state courts of Hawaii;

2. Whether the judgment below rests on independent and adequate state law grounds.

3. Whether petitioner has a due process claim and, if so, whether it has any general importance;

PARTIES TO THE PROCEEDINGS

Respondents submitting this brief are Sharon Damon, Siddhartha Damon (by and through the Siddhartha Damon Trust), Sharmaya Sorenson, Ted (Frank Edward) Shaw, Heidi Ann Shaw, Talia Ann (Shaw) Hendricks, Samuel Kenny Damon, Julio Damon Spee, Miles Samuel Spee, Phillip Edward Spee, and Pia Spee, all of whom were appellees before the Supreme Court of Hawai'i. (See Pet. at iii.)

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On Petition for a Writ of Certiorari to the Supreme Court of Hawaii

BRIEF IN OPPOSITION

COUNTERSTATEMENT OF THE CASE[1]

The facts are as stated in the opinion of the Supreme Court of Hawaii. (App. at 2a-20a.) As that opinion makes clear,

[1] Pursuant to Rule 12.6 of this Court, respondents John Philip Damon and Brendan Damon Mesker (the "Mesker respondents") have filed a brief limited to advising the Court that they "support the position of Petitioner" (Brief of Respondents in Support of the Petition ("Mesker Resp'ts Br.") at 1), and respondents Michael E. Haig and Wendy A. Haig (the "Haig respondents") have filed a substantive brief (Brief of Respondents Michael E. Haig and Wendy A. Haig in Support of Petition for a Writ of Certiorari ("Haig Resp'ts Br.")), also in support of petitioner. The arguments advanced in the Haig respondents' brief track, and suffer from the same infirmities as, the contentions set forth in the petition itself. Accordingly, except where noted, we do not extend this brief by separately citing or addressing them.

this case involves only the interpretation under Hawaii law of the corpus distribution provision in a trust created under a last will and testament executed by Samuel Mills Damon, who died in 1924. A number of Mr. Damon's descendants, including petitioner, filed a petition with the First Circuit Court of Hawaii, sitting as the probate court. The circuit court petition sought an interpretation of a provision in the trust instrument that directed distribution of the trust corpus to "all of my issue who shall then be living per stirpes and not per capita." (*Id.* at 7a.)

The various groups of descendants advanced three different constructions: one that set the stirpital root at the level of Mr. Damon's children (respondents' position), another at the level of his grandchildren, and yet another at the level of his great-grandchildren (petitioner's and the Haig respondents' proposed interpretation). (*Id.* at 11a-12a.)[2] The circuit court concluded that the text of the will required setting the root at the children's level. (*Id.* at 17a.)

Petitioner and the Haig respondents appealed to the Supreme Court of Hawaii and filed briefs which (like their briefs in the circuit court) did not mention any federal issue. (App. at 62a-67a; *see infra* note 6.)[3] The supreme court affirmed the circuit court in all respects. (App. at 42a.)

The Supreme Court of Hawaii based its affirmance on an interpretation of the will's plain language, including that in provisions setting out detailed instructions regarding the distribution of trust income, which made it clear that Mr. Damon intended that the trust corpus be distributed in the

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[2] The Mesker respondents took no position on the per stirpes issue in the circuit court. (App. at 11a n.8.)

[3] On appeal, the Mesker respondents abandoned their circuit court neutrality stance and adopted petitioner's per stirpes position. (App. at 11a n.8.) The Mesker respondents' brief in this Court does not contend that any of their briefs below raised any federal issues.

same manner as income. (*Id.* at 33a-37a.) The court noted (*id.* at 27a) that eleven years earlier it had construed a will executed in 1926, and held that "[i]mplicit in the phrase ['per stirpes'] is the concept that the 'root' or 'stock' begins with the ancestors of those who are to take and *not* with the takers themselves." *Trust Estate of Dwight*, 909 P.2d 561, 563 (Haw. 1995) (citing Restatement (Second) of Property (Donative Transfers) §§ 25.9 and 28.2 (1988); *Weller v. Sokol*, 318 A.2d 193 (Md. 1974)). The court's opinion did not touch on any federal issue.

Petitioner (alone among the twelve appellants below) subsequently filed a motion for reconsideration. (App. at 68a-73a.) The motion repeated his prior arguments *verbatim*, except for a new phrase tacked on at the end of the motion stating (without citation or explanation) that the court's supposed error in interpreting the will "thereby violat[ed] unforeseeably and harshly the Due Process clauses of the Fifth and Fourteenth Amendments to the U.S. Constitution." (App. at 73a; *compare id.* at 62a-67a (petitioner's opening brief) *with id.* at 68a-73a (petitioner's motion for reconsideration).) The Supreme Court of Hawaii denied the motion without opinion. (*Id.* at 74a-75a.)

REASONS FOR DENYING THE PETITION

I. PETITIONER DID NOT PROPERLY PRESENT, AND THE SUPREME COURT OF HAWAII DID NOT DECIDE, ANY FEDERAL ISSUE

This Court has the power to review state court decisions only if they involve the denial of a federal right that was "specially set up or claimed" in the state court. 28 U.S.C. § 1257(a); *see Howell v. Mississippi*, 543 U.S. 440, 443 (2005) (per curiam). Under § 1257 and its predecessors, this Court "almost unfailingly refuse[s] to consider any federal-law challenge to a state-court decision unless the federal claim 'was either addressed by or properly presented

to the state court that rendered the decision [the Court] ha[s] been asked to review.'" *Howell*, 543 U.S. at 443 (quoting *Adams v. Robertson*, 520 U.S. 83, 86 (1997) (per curiam)).

Petitioner's due process challenge does not meet either criterion.[4] The Supreme Court of Hawaii concededly did not decide petitioner's federal constitutional issue. (Pet. at 7.) Moreover, petitioner did not "properly present" it to that court. His briefs below were bereft of any mention of due process or the Federal (or State) Constitution, or citation to any case discussing any constitutional issue, much less any of this Court's cases. (*See* App. at 62a-73a.) Petitioner's briefs accordingly did not preserve the issue for the Court's review. *See, e.g.*, *Howell*, 543 U.S. at 443 ("Petitioner's brief in the State Supreme Court did not properly present his claim as one arising under federal law. In the relevant argument, he did not cite the Constitution or even any cases directly construing it, much less any of this Court's cases." (footnote omitted)); *cf. Oxley Stave Co. v. Butler County*, 166 U.S. 648, 655 (1897) (A party's intent to invoke the Federal Constitution must be "unmistakably" declared, and a federal issue is not properly presented if "the purpose of the party to assert a Federal right is left to mere inference."); *Adams*, 520 U.S. at 89 n.3 ("[P]assing invocations of 'due process'" that "fail to cite the Federal Constitution or any cases relying on the Fourteenth Amendment" do not "meet [the Court's] minimal

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[4] This is so whether the presentation requirement is viewed as jurisdictional, *see, e.g.*, *Howell*, 543 U.S. at 445 (noting the "long line of cases" so holding), or prudential, because even if the rule is purely prudential, the circumstances in this case warrant no exception to it. *See id.* at 445-46; *Adams*, 520 U.S. at 90 (refusing to review due process issue that was neither presented to nor decided by state court; regardless of the source of the rule, comity and practical considerations counsel against permitting a party to seek to disturb the finality of state court judgments on federal grounds the state court did not have occasion to consider).

requirement that it must be clear that a *federal* claim was presented.").[5]

Nor did petitioner preserve the issue with his passing reference to "due process" in his motion for reconsideration. (*See* App. at 73a.) This Court does not review federal claims raised in the state court for the first time in a request for reconsideration, unless the state court in fact entertained the request and expressly decided the question. *See Adams*, 520 U.S. at 89 n.3 (the Court "generally refuse[s] to consider issues raised clearly for the first time in a petition for rehearing when the state court is silent on the question"); *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549-50 (1987) (declining to review federal issue where "[a]ppellants did not present the issues squarely to the state courts until they filed their petition for rehearing with the Court of Appeal," and "court denied the petition without opinion").

Here, the Supreme Court of Hawaii did not address petitioner's due process argument. The court instead denied his motion for reconsideration without opinion (App. at 74a-75a), consistent with its procedural rule that legal arguments made for the first time on reconsideration come too late. *See State ex rel. Office of Consumer Prot. v. Honolulu Univ. of Arts, Scis. & Humanities*, 135 P.3d 113, 128 (Haw. 2006) ("'[R]econsideration is not a device . . . to raise arguments . . .

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[5] Petitioner did not present his due process issue to the circuit court either. His Statement of the Case (Pet. at 1-8) does not specify any stage of the proceedings in the state "court of first instance" when he raised his federal claim, as required by Rule 14.1(g)(i) and (i)(v) of this Court. Thus, even if petitioner had raised the issue in his briefs to the state supreme court, that court would have rejected the claim as untimely. *See Chung v. McCabe Hamilton & Renny Co.*, 128 P.3d 833, 850 (Haw. 2006) ("'[G]enerally, the failure to properly raise an issue at the trial level precludes a party from raising that issue on appeal.'" (quoting *State v. Hoglund*, 785 P.2d 1311, 1313 (Haw. 1990))).

that could and should have been brought during the earlier proceeding.'" (first ellipsis in original) (citation omitted)).[6]

II. THE JUDGMENT BELOW RESTS ON INDEPENDENT AND ADEQUATE STATE LAW GROUNDS

Had the Supreme Court of Hawaii reached and decided petitioner's federal law issue, his petition still would warrant denial. Except in extreme circumstances, this Court does not exercise its certiorari jurisdiction and review federal questions answered by a state court when the court's ruling rests on independent and adequate state law grounds. *See Coleman v. Thompson*, 501 U.S. 722, 729 (1991) (The Court will not review federal issues decided by a state court "if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment.").

The decision of the Supreme Court of Hawaii rests on two such grounds. First, the court below did no more than complete the task before it—to construe the language of the will to determine Mr. Damon's testamentary intent. The court ruled that, when the will is read as a whole, Mr. Damon's intent was to distribute the trust corpus in the same manner as income. (*See, e.g.*, App. at 35a.) That ruling presents purely a matter of state law, akin to the interpretation of a private contract, "which this Court does not sit to review." *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 474 (1989).

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[6] The reasons why petitioner fails to meet the 28 U.S.C. § 1257 requirements apply *a fortiori* to the respondents who support his petition, as they do not (because they cannot) argue that they raised a due process issue in a motion for reconsideration, let alone in their briefs below. (*See* Haig Resp'ts Br. at 2 n.1 (expressly adopting petitioner's Statement of the Case); Mesker Resp'ts Br. at 1 (expressly adopting petitioner's position).)

Second, petitioner did not raise his claim "at the time and in the manner required" by the rules of the Supreme Court of Hawaii, *Webb v. Webb*, 451 U.S. 493, 501 (1981), i.e., either in the circuit court, *see Chung v. McCabe Hamilton & Renny Co.*, 128 P.3d 833, 850 (Haw. 2006), or in the Supreme Court of Hawaii prior to his motion for reconsideration, *see Honolulu Univ. of Arts, Scis. & Humanities*, 135 P.3d at 128. His failure to do so furnishes an additional independent and adequate state law ground for the state court's judgment. *See Adams*, 520 U.S. at 87-88 & n.1 (noting that the failure to comply with state procedural rules regarding proper presentation of issues provides an independent and adequate state law ground for the state court's judgment); *Webb*, 451 U.S. at 498 & n.4 (same).

III. PETITIONER'S DUE PROCESS CLAIM HAS NEITHER MERIT NOR GENERAL IMPORTANCE

Petitioner contends that the "Supreme Court of Hawaii retroactively applied new law (formulated no earlier than 1995) to reduce Petitioner's vested interest . . . [in violation of] his rights under the Due Process Clause of the Fourteenth Amendment." (Pet. at 8; *see also* Haig Resp'ts Br. at 8.) According to petitioner, the court retroactively applied the Second Restatement of Property (as cited in *Dwight*, 909 P.2d at 563) when it construed Mr. Damon's will, and instead should have applied Hawaii law as it allegedly existed in 1924—i.e., comment h to section 301 of the First Restatement of Property, published in 1940, sixteen years after Mr. Damon's death (Pet. at 4-5).[7] Petitioner asserts that the court's supposed failure to do so "conflicts with several of this Court's decisions concerning retroactive application of

[7] As noted in the Haig respondents' brief (at 5), section 301 of the First Restatement was published in 1940, not in 1936 as petitioner suggests (*see* Pet. at 4).

law." (*Id.* at 8.)[8] As shown below, his argument has at least three independent, but equally fatal flaws and, in any event, he presents a question of importance only to the litigants in this particular case.

A. Petitioner Had No Vested Property Right

Petitioner's due process argument fails on its own terms. He contends that he had a vested property right in Mr. Damon's estate in 1995. In his view, when the Supreme Court of Hawaii purportedly "changed" the law in *Dwight*, and then followed it eleven years later in this case, it reduced his supposedly vested right in violation of the Due Process Clause. (Pet. at 8; *see also* Haig Resp'ts Br. at i.)

Petitioner, however, had no vested right in 1995. The will provided for distribution of the trust corpus to Mr. Damon's issue "who shall then be living" at the death of his last surviving grandchild. (*See* App. at 7a.) Petitioner's rights therefore were contingent upon his surviving that grandchild, and those rights did not vest under Hawaii law until 2004, when the last grandchild died. (*See id.* at 9a & n.6); *see also Carter v. Davis*, 18 Haw. 439, *available at* 1907 WL 1386, at *4 (Haw. 1907) (Where testator makes gift to descendants "then living" at a future time, "the conclusion is almost irresistible that the devise of the future interest does not vest at the testator's death, but is contingent upon the devisees living to acquire the actual possession. The members of the class who are alive at the death of the testator take contingent remainders which vest in possession only in case they survive the life tenant."). Petitioner could not have been deprived of any part of a vested property right he did not have. *Cf. Bd. of*

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[8] Petitioner had a very different view of retroactivity below. There, he argued *in favor* of retroactive application of the law—specifically, the 1996 amendments to Hawaii's probate code. (*See* App. at 29a.) His theory thus appears to be that retroactivity comports with due process so long as the law to be retroactively applied supports him.

Regents of State Colls. v. Roth, 408 U.S. 564, 577 (1972) (due process principles protect only those property interests to which an individual has "a legitimate claim of entitlement").

B. The First Restatement Was Never The Law In Hawaii

Petitioner's "retroactivity" argument proceeds from the assumption that the First Restatement was once the law in Hawaii. It was not. Restatements are not law, and Hawaii courts often reject Restatement positions. *See, e.g.*, *Kohn v. W. Haw. Today, Inc.*, 656 P.2d 79, 82-83 (Haw. 1982) (declining to adopt § 580B of the Restatement (Second) of Torts); *Meridian Mortgage, Inc. v. First Hawaiian Bank*, 122 P.3d 1133, 1143 (Haw. Ct. App.) (same with respect to § 767 of the Restatement (Second) of Torts), *cert. denied*, 125 P.3d 1059 (Haw. 2005). Petitioner himself recognizes that the First Restatement's position was not "the law" in 1924, but at most was the "majority view" at the time. (App. at 71a; *see* Haig Resp'ts Br. at 5-6 & n.3 (conceding that courts prior to 1924 had rejected the First Restatement view)); *see also* William Draper Lewis, *"How We Did It," in Restatement in the Courts: History of the American Law Institute and the First Restatement of the Law* 12 (1945) (statement of Director of the American Law Institute that the First Restatement represents the "majority" view, and that "[t]here is always the possibility that a State has followed in the past and will continue to follow a different rule").

Petitioner cites no case in which the Hawaii courts adopted section 301 of the First Restatement, or the legal principles there discussed, before or after 1924, and the Haig respondents candidly admit that there are none. (*See* Haig Resp'ts Br. at 5.)[9] This is unsurprising, as the Supreme Court of

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[9] Although the Haig respondents claim that Hawaii's intestacy statute somehow reflected the "common understanding" of the term "per stirpes" used in a will (Haig Resp'ts Br. at 7), as the Supreme Court of Hawaii

First Restatement's position, holding with respect to a will executed in 1926 that a gift made "per stirpes" requires that the stirpital root "begins with the ancestors of those who are to take and *not* with the takers themselves." *Dwight*, 909 P.2d at 563. Thus, rather than "changing" the law, the state court merely announced Hawaii law as it always existed. *Cf. Great N. Ry. Co. v. Sunburst Oil & Ref. Co.*, 287 U.S. 358, 365 (1932) (noting the "ancient dogma that the law declared by [the] courts ha[s] a Platonic or ideal existence before the act of declaration, in which event the discredited declaration will be viewed as if it had never been, and the reconsidered declaration as law from the beginning").[10]

C. If The Decision In Fact Had Been "Retroactive," Petitioner Still Would Have No Due Process Claim

Even assuming that section 301 of the 1940 First Restatement somehow reflected Hawaii law in 1924 and that the Supreme Court of Hawaii retroactively changed it, such a ruling would have neither "conflict[ed]" with this Court's decisions (Pet. at 8), nor raised any due process issue. While it may be true, as petitioner contends, that the Court has

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held, the intestacy statute is irrelevant here because Mr. Damon did not die intestate. (*See* App. at 40a-41a.)

[10] In support of its holding that "per stirpes" means taking the share of one's ancestor, the court in *Dwight* relied in part on the Maryland Court of Appeals' 1974 decision in *Weller*, which predated the Second Restatement by fourteen years. *See Dwight*, 909 P.2d at 563. *Weller*, in turn, relied on a case from 1954 which held that, with respect to a trust instrument executed in 1912, the stocks must be set "among the testator's children, and not among the first takers." 318 A.2d at 197 (citing *Ballenger v. McMillan*, 106 A.2d 109 (Md. 1954)). Thus, contrary to petitioner's claim that section 301 of the First Restatement "fairly reflect[ed] the state of the law" in 1924 (Pet. at 4), it is clear that courts in the early part of the 20th Century rejected the First Restatement's approach.

this presumption applies only to retroactive *legislation*. The reverse presumption applies with respect to judicial decisions.

Indeed, "*[a]s a rule*, judicial decisions apply 'retroactively' . . . [and] a legal system based on precedent has a built-in presumption of retroactivity." *Solem v. Stumes*, 465 U.S. 638, 642 (1984) (emphasis added) (citation omitted). The very cases upon which petitioner relies draw this distinction between statutory and judicial retroactivity, and follow the "firm rule" in favor of judicial retroactivity. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 279 n.32 (1994) (noting that the Court has "established a firm rule of retroactivity" of federal judicial decisions); *United States v. Sec. Indus. Bank*, 459 U.S. 70, 79 (1982) ("The principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar to every law student.").[11] Thus, even were petitioner correct that the Supreme Court of Hawaii retroactively applied its case law (and he is not), doing so would have been fully consistent with this Court's jurisprudence.[12]

Nor would the state court's retroactive application of its precedent to petitioner's detriment have raised any due process concerns. This Court long ago held that "[s]tate courts . . . may ordinarily overrule their own decisions without offending constitutional guaranties, even though parties may

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[11] Indeed, in his brief to the Supreme Court of Hawaii, petitioner recognized this black-letter principle, and acknowledged that "*[l]egislative changes operate prospectively; judicial decisions are retrospective.*" (App. at 65a (emphasis in original) (citation omitted).) The Haig respondents likewise concede that as a rule, judicial decisions apply retroactively. (Haig Resp'ts Br. at 9.)

[12] The state court decisions petitioner cites (Pet. at 11 n.3) all involved retroactive application of legislation, not judicial decisions. Thus, even if the Supreme Court of Hawaii had retroactively applied its case law or the Restatement, there would be no "conflict" (*id.*) with these state court decisions.

decisions. *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 681 n.8 (1930); *see also, e.g., Great N. Ry.*, 287 U.S. at 364 ("We think the federal constitution has no voice upon the subject [of whether a state court gives its decisions a retroactive effect]."); *Tidal Oil Co. v. Flanagan*, 263 U.S. 444, 450 (1924) ("[T]he mere fact that the state court reversed a former decision to the prejudice of one party does not take away his property without due process of law."); *cf. Am. Trucking Ass'ns, Inc. v. Smith*, 496 U.S. 167, 177 (1990) ("When questions of state law are at issue, state courts generally have the authority to determine the retroactivity of their own decisions.").[13]

Nothing in *Bouie v. City of Columbia*, 378 U.S. 347 (1964), upon which petitioner principally relies (Pet. at 10-11), is to the contrary. *Bouie* held that a state court violates the Due Process Clause's requirement that a criminal defendant be afforded "fair warning" of a criminal statute's prohibitions, when the court "unforeseeably and retroactively" expands by judicial construction an otherwise "narrow and precise" criminal statute. 378 U.S. at 352. This Court recently clarified the scope of *Bouie*, holding that "a judicial alteration of a common law doctrine of criminal law violates the principle of fair warning, and hence must not be given

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[13] *Dunn v. Micco*, 106 F.2d 356 (10th Cir. 1939), cited by petitioner (Pet. at 9, 10), and *Thomas v. Washington Gas & Light Co.*, 448 U.S. 261, 272 (1980), cited by the Haig respondents (Haig Resp'ts Br. at 11), are fully consistent with these well-settled principles. Although the court in *Dunn* indicated its reluctance to depart from previous rulings in property cases, it did not base its reluctance on any due process concerns (nor could it have given this Court's decisions), but instead on the prudential doctrine of stare decisis. *See Dunn*, 106 F.2d at 358-59. This Court in *Thomas* likewise indicated its general reluctance to overrule its decisions under the doctrine of stare decisis. As discussed above, however, whether a state court adheres to the doctrine of stare decisis is a matter of no constitutional import. *See, e.g., Great N. Ry.*, 287 U.S. at 364.

retroactive effect, *only where* it is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue.'" *Rogers v. Tennessee*, 532 U.S. 451, 462 (2001) (quoting *Bouie*, 378 U.S. at 354) (emphasis added).

This case, of course, does not involve a criminal statute, and the "fair notice" principle does not apply. Moreover, there was no "unexpected and indefensible" change in the law, for, as discussed above, Restatements are not law, and petitioner cites no Hawaii case that ever adopted the principles he claims should have controlled in this case. Thus, the rule in *Bouie* is simply inapplicable. *See Rogers*, 532 U.S. at 464 (no due process violation where law that was retroactively changed by judicial decision "had only the most tenuous foothold as part of the criminal law" of the state); *cf. Bouie*, 378 U.S. at 356-57 (due process violated where state court's previous construction of criminal law "uniformly emphasized" a construction different from the one it applied to defendant); *Brinkerhoff-Faris*, 281 U.S. at 682 n.9 ("Had there been no previous construction of the statute by the highest court, the plaintiff would, of course, have had to assume the risk that the ultimate interpretation by the highest court might differ from its own.").

D. Petitioner's Issue Has No Importance Beyond This Case

Finally, petitioner offers no "compelling reason" why his dissatisfaction with a state court's interpretation of a corpus distribution provision in a will executed over ninety years ago (an interpretation he requested) presents a question worthy of this Court's time and attention. *See* Rule 10 of this Court. Petitioner finds the state court's interpretation objectionable because it results in his receiving a lower percentage of the trust corpus than he would receive under the interpretation he favors. Even if this complaint had merit (and, as we have

shown, it does not), it would have no significance beyond this case. *See Rice v. Sioux City Mem'l Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955) ("[T]his Court does not sit . . . for the benefit of the particular litigants," but rather reviews only "special and important" cases that raise issues "beyond the academic or the episodic.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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